MAR - 6 1995

No. 94-623

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

VIMAR SEGUROS Y REASEGUROS, S.A.,

Petitioner,

—v.—

M/V SKY REEFER, her Engines, etc., and M.H. MARITIMA, S.A.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITIONER'S REPLY BRIEF

LAWRENCE S. ROBBINS
ANDREW J. MORRIS
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 778-0611

STANLEY McDERMOTT III
Counsel of Record
LEO G. KAILAS
Varet & Fink P.C.
53 Wall Street
New York, New York 10005
(212) 858-5407

BEST AVAILABLE COPY

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
PRELIMINARY STATEMENT	1
ARGUMENT	2
A. Foreign Arbitration Clauses Lessen The Carrier's Liability In Violation Of Section 3(8) Of COGSA	2
B. The FAA Does Not Conflict With COGSA	9
C. COGSA Prevails Even If In Conflict With The FAA	12
CONCLUSION	16

TABLE OF AUTHORITIES

Cases PAGE

AVC Nederland B.V. v. Atrium Inv. Partnership, 740 F.2d 148 (2d Cir. 1984) 9

Boyd v. Grand Trunk Western R. Co., 338 U.S. 263 (1949) 4

Brown v. General Services Administration, 425 U.S. 820 (1976) 13

Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 595 (1991) 12

Conklin & Garrett Ltd. v. M/V Finnrose, 826 F.2d 1441 (5th Cir. 1987) 3

Farmer v. Employment Sec. Comm'n of North Carolina, 4 F.3d 1274 (4th Cir. 1993) 13

Indussa Corp. v. S.S. Ranborg, 377 F.2d 200 (2d Cir. 1967 .....5, 6, 14

Knott v. Botany Worsted Mills, 179 U.S. 69 (1971) ... 3

Ledee v. Ceramiche Ragno, 684 F.2d 184 (1st Cir. 1982) 15

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc. 473 U.S. 614 (1985).....7, 11, 13

Morton v. Mancari, 417 U.S. 535 (1974) 9

The Morviken, [1983] 1 Lloyd's Law Rep. 1 5

Wm. H. Muller & Co. v. Swedish American Line Ltd., 224 F.2d 806 (2d Cir.), *cert. denied*, 350 U.S. 903 (1955) 4, 5

Scherk v. Alberto-Culver Company, 417 U.S. 506 (1974) 15

PAGE

Sen Mar, Inc. v. Tiger Petroleum Corp., 774 F. Supp. 879 (S.D.N.Y. 1991) 15

State Establishment for Agricultural Product Trading v. M/V Wesermunde, 838 F.2d 1576 (11th Cir.), *cert. denied*, 488 U.S. 916 (1988) 8

United States v. Louwsma, 970 F.2d 797 (11th Cir. 1992), *cert. denied*, 113 S. Ct. 1383 (1993) 13

Volt Information Services, Inc. v. Board of Trustees of Leland Stanford Junior University, 489 U.S. 468 (1989) 11

Statutes

9 U.S.C. 1-15..... 14

9 U.S.C. 2 13

9 U.S.C. 3 14

9 U.S.C. 201-208 .....14, 15

9 U.S.C. 208..... 14

46 U.S.C. 190 3

46 U.S.C. 1300 .....3, 4, 5, 8, 9, 12

46 U.S.C. 1303(2)..... 7

46 U.S.C. 1303(8).....*passim*

46 U.S.C. 1304(2)(i) 7

46 U.S.C. 1312.....3, 4, 5, 9, 12

PAGE

Other Authorities

Brussels Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Aug. 25, 1924 (the *"Hague Rules"*), 51 Stat. 233, T.S. No. 931, 120 L.N.T.S. 155

Article 3(8) 5

G. Gilmore and C. Black, Jr., *The Law of Admiralty* (2d ed. 1975) 3, 7

J. Honnald, *Ocean Carriers and Cargo; Clarity and Fairness—Hague Rules or Hamburg?*, 24 J. Mar. L. & Com. 75 (1993) 15

Japanese Hague Rules, Article 3(1) 7

The Oxford English Dictionary (1971) 3

Uniform Ocean Bills of Lading—Hague Rules, H.R.Rep. No. 2218, 74th Cong., 2d Sess. (1936) 4, 7

United Nations Convention on the Carriage of Goods by Sea, 31 March 1978 (the *"Hamburg Rules"*), U.N. Document A/CONF. 89/13, reprinted in 6 *Benedict on Admiralty*, Doc. 1-3 (7th ed. 1994).. 15

United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, [1970] 3 U.S.T. 2517, T.I.A.S. No. 6997 14

Article II(2) 14

Article II(3) 15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-623

VIMAR SEGUROS Y REASEGUROS, S.A.,

Petitioner,

—v.—

M/V SKY REEFER, her Engines, etc., and M.H. MARITIMA, S.A.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF FOR THE PETITIONER

PRELIMINARY STATEMENT

Respondents defend the court of appeals' decision in this case by embracing all of its principal errors. Like the court below, respondents assume that COGSA and the FAA are in "conflict," and they therefore invoke maxims of statutory construction to select a winner. Like the court below, respondents cast their lot with the FAA because, in their view, it is more "specific" and was later enacted. And most fundamentally, respondents, like the court below, ignore the text and policies of COGSA, which cannot be squared with a foreign

arbitration clause—particularly one, as in this case, that requires the application of foreign law, not COGSA.

ARGUMENT

A. Foreign Arbitration Clauses Lessen The Carrier's Liability In Violation Of Section 3(8) Of COGSA

1. In one respect, respondents depart from the court of appeals' decision. Unlike the court of appeals—which conceded that "absent the FAA, COGSA might operate to nullify foreign arbitration clauses in bills of lading" (Pet. App. 10a n.5)—respondents contend (Resp. Br. 35-39) that section 3(8) does not cover foreign arbitration clauses at all. In their view, "the 'lessening' language of section 3(8) refers specifically to the carrier's 'liability' under COGSA and should be read to apply specifically to, and only to, those liabilities described in the other sections of COGSA" (Resp. Br. 37). In particular, respondents add, "[t]he lessening provision of section 3(8) should be construed to apply to * * * [duties] such as the duty to load, stow and handle the cargo properly and carefully, and to preclude the enforcement of a bill-of-lading provision which, by its terms, limits those responsibilities and liabilities" (*id.* 39).

That is true, but irrelevant. We fully agree that section 3(8) applies to those "responsibilities and liabilities * * * which are specified plainly in COGSA" (Resp. Br. 39); after all, that is exactly what the statute says. See 46 U.S.C. 1303(8). The question, however, is not what kinds of liabilities "lessening" *applies to*; the question is what "lessening" *means*, and how broadly it should be construed. On that question, respondents venture no view at all. Apparently, respondents would limit the term "lessening" only to clauses that "relieve," "shorten," or "reduce" the substantive obligations imposed on carriers in sections 3 and 4 of COGSA (Resp. Br. 37-38). But "lessening" sweeps much more broadly, including *any* means by which an object is made "less in size, quantity, scope,

amount, etc." *The Oxford English Dictionary* (1971). Thus, to "lessen" liability encompasses any provision by which liability is made more difficult or costly to establish—including, as here, by coupling enormous transaction costs with the application of foreign law.[1]

2. That is certainly the view this Court took in *Knott v. Botany Worsted Mills*, 179 U.S. 69 (1900). As we explained in our opening brief (at 13-14), the Court in *Knott*, applying the nearly identical language in section 1 of the Harter Act, 46 U.S.C. 190, the precursor to section 3(8), invalidated a bill-of-lading clause that purported to require the application of foreign law to bill-of-lading claims. The Court held that the foreign-law clause was inconsistent with the Act, which prohibited any bill-of-lading clause that "relieved" a carrier from liability.[2] The lesson of *Knott* is clear: liability is "relieved" (and, thus, necessarily is "lessened") by any bill-of-lading clause that displaces (or threatens to displace) the application of COGSA rules.

Respondents overlook this aspect of *Knott*, treating the case as if it "simply held that provisions in a bill of lading which would permit the carrier to avoid liability for its own negligence contravened a specific provision in the Harter Act" (Resp. Br. 38). But that is not all the case held: in addition to invalidating the exculpatory negligence clause, the Court explicitly struck down the foreign-law clause. If respondents were correct that the words "relieving" and "lessening" in

---

[1] Accordingly, " '[i]t is *entirely unrealistic* to look to an obligation to sue overseas as not 'lessening' the liability of the carrier' " *Conklin & Garrett Ltd. v. M/V Finnrose*, 826 F.2d 1441, 1444 (5th Cir. 1987) (quoting G. Gilmore and C. Black, Jr., *The Law of Admiralty* 146 n.23 (2d ed. 1975) (emphasis added)—and the same holds true for arbitration overseas.

[2] And as the leading treatise observes, the enacting section of COGSA, 46 U.S.C. 1300, prohibits foreign law clauses (and likewise foreign forum selection clauses that incorporate foreign law clauses) "just as clearly as or more clearly than Harter." G. Gilmore & C. Black, Jr., *The Law of Admiralty* 146 (2d ed. 1975). See also 46 U.S.C. 1312.

section 3(8) cover only clauses that directly alter liability rules, the Court could not, and would not, have struck down the foreign-law provision in *Knott*. But it did.[3]

3. As we explained in our opening brief (at 14-17), the courts of appeals, applying the principles in *Knott*, have uniformly invalidated not only foreign-law clauses, but also foreign forum selection clauses in maritime bills of lading. Taken together, these cases reflect a sensible, practical construction of the term "lessening" in section 3(8) of COGSA—a construction that extends equally to (and equally prohibits) foreign arbitration clauses.[4]

---

[3] In other contexts, the Court has ruled that venue restrictions imposed by carriers represent prohibited exemptions from liability. See *Boyd v. Grand Trunk Western R. Co.*, 338 U.S. 263, 265 (1949) ("We hold that petitioner's right to bring the suit in any eligible forum is a right of sufficient substantiality to be included within the Congressional mandate of § 5 of the [Federal Employers'] Liability Act: 'Any contract, rule, regulation or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this Act, shall to that extent be void * * *.' The contract before us [restricting the choice of venue for an action based on FELA] is therefore void.").

[4] The legislative history of COGSA (see *Uniform Ocean Bills of Lading—Hague Rules*, H.R.Rep. No. 2218, 74th Cong., 2d Sess. (1936)) does not suggest that Congress intended to leave COGSA at the mercy of the ocean carriers. The domestic legislative history on which *amici* mainly rely consists of bills introduced to amend the Harter Act over twenty years before COGSA was enacted. Amici Br. at 18 n.9. These bills do not speak to the enactment of COGSA in 1936 and certainly do not suggest that Congress intended foreign forum selection clauses to be beyond COGSA's reach (no matter what the impact such clauses might have on a bill-of-lading holder's COGSA rights).

Nor does the legislative history of COGSA's enactment in 1936 suggest that Congress, by not modeling COGSA on some other statute that preceded the Hague Rules (such as the prior Canadian act), intended that 46 U.S.C. 1300, 1303(8) and 1312 *not* apply to foreign forum selection clauses that have the undoubted practical effect of "lessening" the carrier's liability (ousting COGSA altogether in the process). Such unfounded speculation concerning congressional intent was the primary basis for the decision in *Wm. H. Muller & Co. v. Swedish American Line*

Respondents acknowledge that "courts of appeals and district courts have held that foreign jurisdiction clauses in maritime bills of lading lessen the carrier's liability and are void under COGSA" (Resp. Br. 27). They contend, however, that, for two reasons, the logic of those cases does not extend to foreign arbitration clauses. First, they note that, unlike the case with forum selection clauses, there is a federal statute—the FAA—which specifically provides for the enforceability of foreign arbitration clauses (Resp. Br. 28). But respondents misunderstand the point. We rely on *Knott* and the forum selection cases to underscore the proposition that *section 3(8) of COGSA* prohibits foreign arbitration clauses. Whether the FAA separately requires enforcement of such provisions (it does not) has no bearing on whether COGSA, standing alone, reaches foreign arbitration clauses.

Second, respondents maintain, in essence, that the forum selection cases prove too much. They note that in *Indussa Corp. v. S.S. Ranborg*, 377 F.2d 200 (2d Cir. 1967), Judge Friendly concluded that it would "lessen" liability to remit a party to a foreign forum in which there was "no assurance that the judge there will apply COGSA 'in the same way as would an American tribunal subject to the uniform control of

---

Ltd., 224 F.2d 806, 807 (2d Cir.), *cert. denied*, 350 U.S. 903 (1955), which the Second Circuit expressly rejected in *Indussa Corp. v. S.S. Ranborg*, 377 F.2d 200 (2d Cir. 1967) (*en banc*) (relying, *inter alia*, on *Knott* and 46 U.S.C. 1300, 1303(8) and 1312).

The history of the Hague Rules also does not speak to the enactment of COGSA in 1936 (particularly in light of 46 U.S.C. 1300 and 1312, which have no counterpart in the Hague Rules). In addition, *amici* are wrong in asserting that under the Hague Rules forum selection clauses are merely "procedural" and therefore outside the scope of article 3(8) of the Hague Rules (Amici Br. at 17). This "narrow" construction of article 3(8) of the Hague Rules was rejected by the House of Lords in *The Morviken*, [1983] 1 Lloyd's Law Rep. 1, 6-7 (the "only sensible meaning to be given to the descriptions of provisions in contracts of carriage which are rendered 'null and void and of no effect' by [article 3(8)] is one which would embrace every provision in a contract which, if it were applied, would have the effect of lessening the carrier's liability otherwise than as provided in the rules").

the Supreme Court' " (Resp. Br. 28 (quoting *Indussa*, 377 F.2d at 203-204)). But that risk, respondents assert, is true in *any* arbitral forum, foreign or domestic. Accordingly, they reason, if this line of cases were applicable, *all* arbitration would be prohibited in COGSA cases (Resp. Br. 29-30).

But that is not so. American arbitrators, first and foremost, are governed by American decisional law. They are required to apply settled American legal principles in resolving disputes governed by United States law. True, their application of United States law may, in particular cases, depart from prevailing judicial interpretations. But the risk of such departures is surely more modest in the case of arbitration in the United States than in the case of arbitration overseas. After all, foreign arbitration poses more than simply the risk that foreign arbitrators will apply COGSA in a different way; it risks the prospect (as often as not the virtual certainty) that arbitrators will not apply COGSA at all, but will instead apply foreign law and foreign procedures—all in a remote and costly jurisdiction that may be substantially unconnected with the merits of the underlying dispute.[5]

Indeed, those are precisely the circumstances in this case. The bill of lading explicitly provides that the contract "shall be governed by Japanese law;" COGSA comes into play only if "it shall be adjudged that the Japanese law does not govern this Bill of Lading" (J.A. 49, 56).[6] As we explained in our

[5] Respondents not only concede the added risks of arbitration, in which an "error in the application of law by the arbitrators ordinarily will not provide a basis for vacating an award" (Resp. Br. at 30), but also identify as a "feature" of arbitration that foreign arbitrators would "not be expected to apply the law with the same exactitude as would a court in the United States" (*id.* at 33). It follows that foreign arbitration clauses "lessen" the liability of ocean carriers *more so* than foreign suit clauses.

[6] Respondents state somewhat elliptically that the bill of lading "provides for the application of COGSA in certain circumstances" (Resp. Br. 32). The "circumstance" referred to is an "adjud[ication]" that Japanese law does not otherwise control. There has been no such adjudication in this case.

opening brief (at 21-22 & n.19), Japanese law is materially different from COGSA.[7] But even if it were not clearly different, a fundamental purpose of COGSA is to spare consignees the guesswork—to "relieve" them "of the necessity of closely examining all bills of lading to determine the exceptions contained therein * * *." *Uniform Ocean Bills of Lading—Hague Rules*, H.R.Rep. No. 2218, 74th Cong., 2d Sess. 7 (1936).[8]

In any event, the court below concluded that the FAA trumps COGSA *without regard* to whether the foreign arbitrators might apply foreign law—even a materially *different* foreign law—in the arbitral forum. In the court of appeals' view, foreign arbitration clauses are exempt from COGSA, even if the foreign arbitrators would likely ignore COGSA altogether. That conclusion cannot be squared with this Court's statement in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985), that

[7] A hallmark of COGSA (Pet. Br. at 21) is that the duty imposed on the carrier in section 3(2) to "properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried" is non-delegable. 46 U.S.C. 1303(2). The comparable provision of the Japanese Hague Rules, Article 3(1) (J.A. 112), does not render the carrier's obligation to load and stow the cargo non-delegable and is therefore directly contrary to section 3(2) of COGSA. Respondents' reliance on section 4(2)(i) of COGSA, 46 U.S.C. 1304(2)(i) (see Resp. Br. at 32 n.25), is misplaced because that exception does not relieve the carrier of the overriding, non-delegable obligation to "properly and carefully load [and] stow" the cargo which is set forth in section 3(2) of COGSA. See G. Gilmore & C. Black, Jr., *The Law of Admiralty* 169-173 (2d ed. 1975).

[8] COGSA also prevents carrier overreaching in the form of boilerplate bill-of-lading clauses that are imposed in foreign ports on shippers (and hence on the American consignees to whom such bills of lading are negotiated incident to the sale of goods), who frequently lack the wherewithal to reject the carrier's bill-of-lading terms (or have no alternative but to acquiesce to such terms). COGSA thereby gives American businessmen comfort that the contract of carriage—which is essential to the purchase and sale of goods abroad—is enforceable in the United States according to COGSA rules (regardless of the boilerplate terms in the bill of lading issued to the shipper at the loading port).

"in the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies * * *, we would have little hesitation in condemning the agreement as against public policy."

The short of the matter is this. Although arbitration, as such, "is consistent with the purposes of COGSA" (Resp. Br. 25), there is a world of difference between domestic arbitration under COGSA rules and Supreme Court precedent, and arbitration in a distant and unrelated foreign forum, under foreign law and procedures. Thus, the Eleventh Circuit was entirely correct when it held, in *State Establishment for Agricultural Product Trading v. M/V Wesermunde*, 838 F.2d 1576, 1581 (11th Cir.), *cert. denied*, 488 U.S. 916 (1988), that "[w]hile * * * arbitration in and of itself is [not] *per se* violative of COGSA's provisions, especially in light of Congress' encouragement of arbitration by its enactment of the [FAA], * * * a provision requiring arbitration in a *foreign* country that has no connection with the performance of the bill of lading contract or the making of the bill of lading contract is a provision that would conflict with COGSA's general purpose of not allowing carriers to lessen their risk of liability" (emphasis in the original).

4. We note, finally, that respondents barely even address our contention that foreign arbitration clauses cannot be squared with the *purposes* of COGSA. As we explained in our opening brief (at 22-25), COGSA was designed to promote uniformity in bills of lading, to preclude carriers from evading their COGSA duties, and to afford shippers and consignees certainty in maritime transactions "to or from ports of the United States" (46 U.S.C. 1300). Foreign arbitration clauses deprive cargo owners of those statutory benefits. Furthermore, respondents (and *amici*) do not deny that if foreign arbitration-and-law clauses were enforceable, they would soon be found in virtually every carrier's bill of lading; in

short order, COGSA itself would become entirely "null and void and of no effect" (46 U.S.C. 1303(8)).[9]

B. The FAA Does Not Conflict With COGSA

Admittedly, even if section 3(8) of COGSA would otherwise prohibit foreign arbitration clauses, Congress *could* supersede that provision by enacting another, inconsistent statute that clearly requires that such clauses be enforced. Respondents believe that section 2 of the FAA does just that. As they put it themselves, "[r]espondents' basic argument in the present case is that the FAA controls with respect to the enforceability of the arbitration clause contained in the Bill of Lading, and therefore COGSA does not apply to that clause" (Resp. Br. at 36 n.27). Like the court below, respondents regard the two statutes as conflicting, and they therefore rely on interpretive principles to resolve that perceived conflict. See *id.* at 15-19.

But respondents do not dispute the cardinal rule that "[t]he courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v. Mancari*, 417 U.S. 535, 551 (1974). As we explained in our opening brief (at 25-33), both the text and policies of the FAA easily accommodate the mandate of COGSA; in this setting, COGSA controls.

---

[9] Instead of addressing these basic policy concerns, respondents invent an entirely new and different "policy" for COGSA—"harmonizing trade among the nations of the world" (Resp. Br. 26). Needless to say, having devised this policy for COGSA, respondents conclude that COGSA and the FAA serve the same purposes. But Congress could not have enacted COGSA in general, and 46 U.S.C. 1300, 1303(8) and 1312 in particular, with the actual intent (as *amici* also postulate) that COGSA *not* prohibit foreign forum-and-law clauses that would, at a stroke, render COGSA itself entirely toothless. *AVC Nederland B.V. v. Atrium Inv. Partnership*, 740 F.2d 148, 160 (2d Cir. 1984) ("[a] foreign exception to COGSA would swallow the whole").

1. As a textual matter, we explained (at 26), the "saving clause" in section 2 of the FAA expressly provides for the enforceability of arbitration clauses "save upon such grounds as exist at law or in equity for the revocation of any contract." One such "ground" for revocation is where an arbitration clause violates federal statutory law. Because a foreign arbitration clause in an ocean bill of lading violates COGSA, it is therefore revocable "at law or in equity" and subject to the saving-clause exception in section 2.

Respondents offer virtually no rebuttal. They concede, as they must, that "illegality may be sufficient grounds for the avoidance of any contract" (Resp. Br. at 26). In their view, however, there is no illegality here because "the FAA is the controlling statute" (*ibid.*). But that contention is completely circular: the FAA is *not* the "controlling statute" if (1) foreign arbitration clauses, like forum selection clauses, violate section 3(8) of COGSA, and (2) the violation of a federal statute (like COGSA) is a ground for revoking a contract at law or in equity. The court of appeals assumed the first point (Pet. App. 10a n.5), and respondents concede the second point. If, as we have argued, foreign arbitration clauses are prohibited by section 3(8) of COGSA, then they are necessarily excepted from coverage under the FAA by virtue of the saving clause in section 2 of the FAA.[10]

2. Beyond the text, the policies underlying the FAA do not conflict with, but in fact readily accommodate, the application of COGSA in this setting. As we explained in our opening

[10] Furthermore, this case does not raise the question whether "Congress has clearly expressed its intent to preclude waiver of a judicial forum for the vindication of other federal statutory rights" (Resp. Br. at 23). Not only does that question have nothing to do with the saving clause of section 2 of the FAA, as respondents wrongly assert (*id.* at 24-25), but petitioner does not contend that COGSA claims cannot be arbitrated. Petitioner has not waived COGSA rights because it has not voluntarily agreed to arbitrate in Japan. Petitioner therefore does not bear the burden "to demonstrate that Congress intended [in COGSA] to preclude arbitration, or that arbitration conflicts with the underlying purpose of [COGSA]" (*id.* at 23).

brief, the fundamental premise of this Court's arbitration cases is that "[a]rbitration under the Act is a matter of consent, not coercion * * *." *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468, 478 (1989).[11] In the context of maritime bills of lading, however, arbitration provisions are never "freely negotiated" (*Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985)), but rather, as the court of appeals acknowledged, "have been viewed as contracts of adhesion" (Pet. App. 8a-9a n.4), and rightly so. Indeed, respondents concede the point, noting that "maritime bills of lading are frequently deemed contracts of adhesion because they appear on preprinted forms and contain numerous boilerplate provisions over which the parties rarely, if ever, negotiate" (Resp. Br. 20), such that "Congress must be presumed to have been aware of the general consensus as to the adhesionary nature of * * * bills of lading" (*id.* at 21). But precisely because bills of lading are not "freely negotiated," the "strong presumption" in favor of arbitration provisions (*Mitsubishi Motors*, 473 U.S. at 631) does not hold the same force, and must instead give way to "the congressional intention expressed in some other statute" (*id.* at 627)—here, the policies of COGSA.

Respondents fundamentally mischaracterize our argument. We manifestly do *not* contend that foreign arbitration clauses in maritime bills of lading are "invalid" (Resp. Br. 20) or "void" (*id.* at 21) simply because they are adhesionary. Rather, because they are adhesionary, such clauses do not warrant the presumption of enforceability that this Court has traditionally applied to freely-negotiated arbitration provi-

[11] We therefore agree with respondents that "this Court has reinforced the principle that the FAA embodies a 'liberal federal policy favoring arbitration agreements' "—but as respondents themselves add, that policy is rooted in " 'the preeminent concern of Congress,' " which was " 'to enforce private agreements into which parties had entered' " (Resp. Br. 12-13). Absent an "agreement," the "liberal federal policy" has much less force.

sions in other settings. Thus, where, as here, foreign arbitration clauses are invoked in a case to which COGSA applies (and are the very *means* by which COGSA rights are deliberately taken away), they do not come clothed with the usual presumption of validity; in this setting, they must give way to competing federal policies.[12]

C. COGSA Prevails Even If In Conflict With The FAA

We therefore believe that COGSA and the FAA are reconcilable and that the court of appeals had no basis for applying interpretive principles to resolve a statutory "conflict." But if the statutes are in conflict, the court of appeals resolved it incorrectly.

1. First and foremost, COGSA, not the FAA, is "the more specific statute." As respondents themselves recognize, "COGSA applies to a more narrow group of contracts" (Resp. Br. 16)—specifically, ocean bills of lading. Moreover, COGSA targets only that subset of bills of lading covering the carriage of goods to and from the United States—the very

[12] *Amici's* reliance on *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991) (Amici Br. at 8-11), is misplaced. First, there is literally a world of difference between a forum selection clause requiring suit in Florida and one requiring arbitration in a remote overseas forum such as Japan (a distinction even respondents acknowledge (Resp. Br. 39 n.29)). Second, in *Carnival Cruise Lines*, the Court was not confronted, as here, with competing policies in two federal statutes; the Court was also not presented with a specific statute, such as COGSA, that expressly regulated the terms of the parties' contract; and the forum selection clause in question did not deprive the plaintiff (as the Japanese arbitration-and-law clause does here) of the benefits of controlling United States law. 46 U.S.C. 1300 and 1312. Third, in that case, the plaintiff concededly had prior notice of the forum clause, unlike petitioner (and other bill-of-lading consignees), to whom bills of lading are invariably presented after the ship has sailed with the cargo on board. Here, moreover, due to the manifest lack of bargaining, federal arbitration policy carries far less weight (and does not override the policies of COGSA). Fourth, clauses providing for arbitration in remote unrelated foreign venues surely "discourag[e] [American cargo owners] from pursuing legitimate claims" (499 U.S. at 595).

category at issue in this case. By contrast, the FAA targets *any* arbitration "provision" in "any maritime transaction or * * * contract evidencing a transaction involving commerce." 9 U.S.C. 2.[13]

"In a variety of contexts the Court has held that a precisely drawn, detailed statute pre-empts more general remedies." *Brown v. General Services Administration*, 425 U.S. 820, 834 (1976). As a result, "a precisely drawn statute dealing with a specific subject controls over a statute covering a more generalized spectrum." *United States v. Louwsma*, 970 F.2d 797, 799 (11th Cir. 1992), *cert. denied*, 113 S.Ct. 1383 (1993). COGSA is indisputably the more "precisely drawn statute" dealing with the "specific subject," the rights and obligations of shippers and carriers under ocean bills of lading. *Ibid.* It follows that COGSA is not the less specific statute simply because, as the court of appeals found, it "makes no reference to arbitration" (Pet. App. 12a). COGSA is the more specific statute because it governs bill-of-lading rights and obligations exclusively and comprehensively.[14]

2. Because COGSA is the more specific statute, it would be controlling (if there is, indeed, a conflict), even if the FAA were the later enacted statute (see Pet. Br. 35-36). For the reasons stated in our opening brief (*id.* at 37-38 & n.36), how-

[13] And as we pointed out in our opening brief (at 34), as stated in *Mitsubishi Motors*, 473 U.S. at 628 (emphasis added), "it is the congressional intention expressed in *some other statute* on which the courts must rely to identify any category of claims as to which agreements to arbitrate will be held unenforceable." The other statute, COGSA, is necessarily the specific statute. By looking *only* to the FAA, respondents ignore that rule.

[14] Likewise, "[i]t is a basic principle of statutory construction that when two statutes are in conflict, a specific statute closely applicable to the substance of the controversy at hand controls over a more generalized provision." *Farmer v. Employment Sec. Comm'n of North Carolina*, 4 F.3d 1274, 1284 (4th Cir. 1993). The statute "closely applicable to the substance of the controversy at hand," *i.e.*, petitioner and respondents' bill-of-lading rights and obligations, is COGSA.

ever, it is highly doubtful that the FAA is, in fact, the later enacted statute: the 1947 enactment of the FAA simply made the United States Code the authoritative source of the statute, rather than the Statutes at Large.

Indeed, respondents do not take issue with that proposition.[15] They assert, however, that even if the 1947 reenactment "does not stand on the same footing as an initial enactment or a re-enactment which incorporates substantive changes in the statute" (Resp. Br. 17), nevertheless the enactment in 1970 of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("Convention") as chapter 2 of the FAA, 9 U.S.C. 201-208, *does* constitute a later enactment, sufficient to trump COGSA (*id.* at 17-19). We disagree.

In the first place, as we have pointed out (Pet. Br. 38 n.37), respondents moved in the district court to stay petitioner's action only under chapter 1 of the FAA, 9 U.S.C. 1-15 (J.A. 21, 28, 36-37), and the district court entered its stay order pursuant only to 9 U.S.C. 3 (Pet. App. 25a). The lower courts, therefore, did not consider the Convention, and respondents, whose motion to stay was not "brought under this chapter," 9 U.S.C. 208, should not be heard to rely on it now.

Chapter 2 of the FAA would not avail respondents in any event. First, since petitioner did not agree in writing to the Tokyo arbitration clause, the Convention would arguably not even apply had it been invoked.[16] Second, like section 2 of the

[15] Respondents claim that the Second Circuit in *Indussa* "concluded that the FAA, as the later-enacted statute, governs" (Resp. Br. 16). In fact, the Second Circuit reached no such "conclusion," since the question was simply not presented. Indeed, as respondents note elsewhere (*id.* at 17), the Second Circuit expressly stated that its "ruling does not touch the question of arbitration clauses in bills of lading which require them to be held abroad." 377 F.2d at 204 n.4.

[16] The Convention, [1970] 3 U.S.T. 2517, T.I.A.S. No. 6997 (reprinted at 9 U.S.C. 201 App.), applies only to arbitration agreements "in writing," defined in article II(2) as including "an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams." Here, the bill of lading was not signed or otherwise agreed to by petitioner. See *Sen Mar, Inc. v. Tiger Petroleum Corp.*, 774 F. Supp. 879, 882-83 (S.D.N.Y. 1991) (Convention held not to apply to arbitration clause in one party's telex).

FAA, the Convention has its own "saving" clause and is therefore readily reconcilable with section 3(8) of COGSA. Article II(3) of the Convention directs courts to refer parties to arbitration "unless it finds that the [arbitration] agreement is *null and void*, inoperative or incapable of being performed" (emphasis added). An arbitration agreement rendered "null and void and of no effect" by virtue of section 3(8) of COGSA is perforce "null and void" under article II(3). *See Scherk v. Alberto-Culver Company*, 417 U.S. 506, 530 n.10 (1974) (Douglas, J. dissenting) (under the Convention a court may decline to enforce an agreement which offends its law or public policy). Chapter 2 of the FAA, 9 U.S.C. 201-208, therefore poses no irreconcilable conflict with COGSA.[17]

[17] This would be true even if, as respondents contend (Resp. Br. 18 n.11), the "null and void" provision of Article II(3) of the Convention were to apply only to defenses "that can be applied neutrally on an international scale." *Ledee v. Ceramiche Ragno*, 684 F.2d 184, 186-87 (1st Cir. 1982). The international maritime community has already spoken out strongly *against* carrier-imposed arbitration clauses in forums unrelated to the voyage in question. Thus, the *United Nations Convention on the Carriage of Goods by Sea, 31 March 1978* ("the Hamburg Rules"), U. N. Document A/CONF. 89/13, adopted without dissent by a diplomatic conference of seventy-six States and many international organizations (but not enacted in the United States), provides that carrier-imposed forum selection clauses in venues unconnected to the voyage in question (whether providing for litigation or arbitration) are unreasonable.

Articles 21 and 22 of the Hamburg Rules (reprinted in 6 *Benedict on Admiralty*, Doc. 1-3 (7th ed. 1994), give the *claimant* the option where to assert its cargo-damage claim and expressly render "null and void" any bill-of-lading forum selection clause that would force a cargo claimant to assert its claim in a remote foreign forum unconnected with the contract of carriage or its performance. See J. Honnald, *Ocean Carriers and Cargo; Clarity and Fairness—Hague Rules or Hamburg?*, 24 J. Mar. L. & Com. 75, 89 (1993) ("Consequently, the carriers' bill of lading may not prevent the shipper from pressing a claim at a place that is connected with performance of the carriage, such as the port of loading or discharge.) The fundamental unfairness of the ocean carriers' foreign home-forum arbitration clause is therefore universally recognized.

CONCLUSION

For the foregoing reasons, and the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted,

LAWRENCE S. ROBBINS
ANDREW J. MORRIS
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 778-0611

STANLEY MCDERMOTT III
Counsel of Record
LEO G. KAILAS
Varet & Fink P.C.
53 Wall Street
New York, New York 10005